Petition

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NO.

in the

Supreme Court

of the

United States

October Term, 1981

IRON ARROW HONOR SOCIETY,
a "tap" or recognition association for men,
Petitioners,

v.

RICHARD S. SCHWEIKER,
Secretary of the Department of Health
and Human Services, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION

Can HEW Regulation 86.31(b)(7) be applied to require a private university to sacrifice its title IX funding if the university permits an exclusively-male honor society, with which the university is associated, but to whom the university provides no direct or indirect financial assistance, to use the campus grounds "to tap" new members?

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, Iron Arrow Honor Society, (hereinafter Iron Arrow or the society) prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Circuit Court of Appeals for the Fifth Circuit entered in this cause on August 3, 1981.

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit is not yet reported. [App. 1-10] The opinion of the United States District Court for the Southern District of Florida is reported at 499 F.Supp. 496 (S.D. Fla. 1980). [App. 11-38]

JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on August 3, 1981. This petition was filed within ninety days of that date.

The jurisdiction of this Court is invoked under Title 28, Sections 1331, 1681, 1682, United States Code (1976), and Title 5, Section 701, United States Code (1976), *et seq.*

QUESTION

Can HEW Regulation 86.31(b)(7) be applied to require a private university to sacrifice its title IX funding if the university permits an exclusively-male honor society, with which the university is associated, but to whom the university provides no direct or indirect financial asistance, to use the campus grounds "to tap" new members?

STATUTES INVOLVED

The following statutes and regulations are involved: Title IX of the Education Amendment of 1976 §§901-02; as codified in Title 20, sections 1681-82, United States Code (1976):

20 U.S.C. §1681(a)(c) 1976:

Prohibition against discrimination; exceptions

(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

* * *

Social fraternities or sororities; voluntary youth service organizations

(6) this section shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts,

Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age.

20 U.S.C. §1682 (1976)

Federal administrative enforcement; report to congressional committees

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient

as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* that no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Code of Federal Regulation §86.31(a), (b)(7)

Subpart D—Discrimination on the Basis of Sex in Education Programs and Activities Prohibited

§86.31 Education programs and activities.

(a) **General.** Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extra-curricular, research,

occupational training, or other education program or activity operated by a recipient which receives or benefits from Federal financial assistance. This subpart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of (1) a recipient to which Subpart C does not apply, or (2) an entity, not a recipient, to which Subpart C would not apply if the entity were a recipient.

(b) **Specific prohibitions.** Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

* * *

(7) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees.

STATEMENT OF THE FACTS

On June 23, 1972, "Title IX" (§901 of Public Law, 92-318, 86 Stat. 373) became effective. That law provides:

(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program

or activity receiving Federal financial assistance except that: . . .

(6) this Section shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from taxation under section 501 (a) of Title 26, the active membership consists primarily of students in an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age; . . .

Title 20, section 1681, United States Code (1976).

Prior to any regulations being adopted by the then Department of Health, Education and Welfare (HEW), it received a complaint against Iron Arrow for discrimination against Indians in violation of Title VI of the Civil Rights Act of 1964 and for discrimination against women under Title IX. The university was informed of this complaint, but before the end of the year, the Indian charge was dropped, and Iron Arrow was absolved of wrongdoing in that regard.

On May 24, 1976, the Office of Civil Rights (O.C.R.) wrote to the president of the university, stating that

O.C.R. had concluded its investigation and had found a Title IX violation:

> It is undisputed that the University of Miami receives Federal financial assistance in the form of student aid and that the Iron Arrow Honor Society does not admit women to membership. Such facts indicate that the University of Miami is in noncompliance with Title IX *if the University provides significant assistance to Iron Arrow* . . . .
>
> The assistance to Iron Arrow Honor Society is of two types. First, Iron Arrow benefits from recognition and identification with the University, thereby enhancing its prestige. Second, Iron Arrow benefits from tangible support such as secretarial services, alumni mailings, and the use of meeting rooms.
>
> * * *
>
> Accordingly, we are informing you that in order for the University of Miami to fulfill its obligation under Title IX, it must either require the Iron Arrow Honor Society to eliminate its policy of excluding women or discontinue its support of the Iron Arrow Society.

Letter of William H. Thomas to Henry King Stanford, May 24, 1976. (Emphasis supplied). [App. 39.]

The university requested additional time to respond, which was granted on July 30, 1976, but in that communication, O.C.R. changes its position:

> We have reviewed Mr. John T. Benedict's memorandum regarding changes in the relationship between Iron Arrow Society and the University. The memorandum does not alter our findings set forth in our May 24, 1976 letter. There continues to be a *significant relationship* between the Society and the University for coverage of the society under Title IX of the Educational Amendments of 1971.

Letter of William H. Thomas to Henry King Stanford, July 30, 1976. (Emphasis supplied.) [App. 45.]

Mr. Thomas' letter referred to the HEW regulations allegedly implementing Title IX, which became effective on July 21, 1975:

> Except as provided in this subpart, in providing any aid, benefits, or service to a student, a recipient shall not, on the basis of sex:
>
> (7) Aid or perpetuate discrimination against any person by providing *significant assistance* to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees . . . (Emphasis supplied)

45 C.F.R. §86.31(b)(7).

The university asked for further time from O.C.R. so as to continue in its efforts to encourage voluntary compliance by Iron Arrow, but at the same time President

Stanford wrote to the "Iron Arrow Brothers" and said that the university would comply with HEW's directive and would refuse to "contest the action of HEW in the Courts."

Following an O.C.R. directive that "no Iron Arrow Society functions, such as tapping take place until the question of the University's compliance is resolved," Iron Arrow filed its complaint in the United States District Court for the Southern District of Florida. An emergency hearing was held on its request for a preliminary injunction, but it was denied. The society then moved for a summary judgment. In its supporting memorandum, a summary of the admissions and denials contained by the defendants in their respective answers was detailed, a part of which is set forth below:

> That the plaintiff, Iron Arrow Honor Society was founded in 1926 as a recognition society to honor the University of Miami students, faculty and alumni who have made outstanding contributions in leadership and services to the University. That it was to be the "highest honor attained by men."
>
> That the Iron Arrow was "chartered" by the University of Miami and that the allegations in the complaint concerning that chartering are accurate.
>
> That Iron Arrow is in fact a recognition society rather than a traditional "honor" society. That future membership is conditioned on the unanimous approval of Iron Arrow

membership, based upon subjective standards and *not* upon criteria developed by the University or any outside agency.

* * *

The University of Miami admits to all of the allegations of paragraph 6 in which the plaintiff has traced its relationship with the university. This includes the admission that the University provides no financial assistance to Iron Arrow, gives no special recognition to members of Iron Arrow and that Iron Arrow receives no other tangible support. The federal defendants have, however, denied those specific allegations while joining with the University or not contesting that the standards for admission to Iron Arrow are established by Iron Arrow, not the University, that there is a voluntary faculty advisor chosen by Iron Arrow not the University, that support by the alumni association for mailing, printing and posting has been discontinued, that there has been no secretarial support of Iron Arrow since 1973, that the Iron Arrow mailbox in the Student Union Building has been eliminated, and that "in brief, the plaintiff could 'move all activities off campus yet retain identical prestige in the community' with the exception of the tapping (selection) ceremony."

* * *

The Federal defendants admit and the University claims no knowledge that the

> regulations of defendant, HEW, do not purport to extend control over groups or organizations as to which a covered education institution does not "provide significant assistance. However, a non-exempt organization whose membership was restricted to members of one sex could adhere to its restrictive policies, and operate on the campus of a recipient University, if it receives no assistance from the University."

HEW fact sheet, June 1975, page 9. (R. at pp 66-70).

The federal defendants filed a cross-motion for summary judgment. On May 24, 1977, the district judge *sua sponte* dismissed the cause for lack of standing on the plaintiff's part. An appeal was taken to the United States Court of Appeals for the Fifth Circuit, which reversed that ruling. *Iron Arrow Honor Society v. Califano*, 597 F.2d 590 (5th Cir. 1979). The matter was returned to the district court and transferred to a new judge, who then considered the motion for summary judgment.

The petitioner submitted additional testimony through affidavit from the "Chief" of the Iron Arrow Tribe in support of its motion for summary judgment. That affidavit set forth the extent to which the "significant assistance" flowed from Iron Arrow to the university, rather than from the university to Iron Arrow. Supplied to the court at the same time was certain material from HEW to concerned individuals around the country which sets out some standards for determining when "significant assistance" exists and highlight the continuing lack of any guidelines for making such determination.

The United States District Court ruled against Iron Arrow and upheld O.C.R.'s interpretation of "significant assistance." *Iron Arrow Honor Society v. Hufstedler*, 499 F.Supp. 496 (S.D. Fla. 1980). An appeal was taken, but the United States Court of Appeals for the Fifth Circuit affirmed. *Iron Arrow Honor Society v. Schweiker*, ____F.2d____, No. 80-5663, (5th Cir. filed August 3, 1981).

REASON FOR GRANTING THE WRIT

I. The appeals court has decided an important question under federal law that threatens the existence of all single-gender collegiate honor societies.

The question whether a private university must forfeit its Title IX funding (Title IX of the Education Amendment of 1972, §§901, 902, 20 U.S.C. §1681, §1682) unless it prohibits an independent exclusively male honor society, to which the university make no direct or indirect financial contribution, from using the campus "to tap" new members, should be settled by this Court. This question, one of first impression, is of particular importance because it involves the extent to which HEW may enforce lawfully the primary federal statute proscribing sex discrimination in federally funded education programs, Title IX of the Education Amendments of 1972, §901, 20 U.S.C. §1681. Specifically, this case presents to the Court a single issue: whether HEW Regulation 86.31(b)(7), which forbids a recipient of Title IX funding from providing "significant assistance" to an organization that discriminates on the basis of sex, can be applied to forbid the recipient from associating with the organization as the price for the federal funds or may be applied solely to prohibit the recipient from assisting financially the discriminatory organization. Iron Arrow maintains that the regulation has no application where, as here, a university has a relationship with a discriminatory organization, but does not provide the organization any direct or indirect financial assistance.

Contrary to the language, purpose and legislative history of Title IX, the decisions below have applied HEW Regulation 86.31(b)(7) as if the strictures of Title

IX were to be applied on an institutional basis. The lower courts have held that because the University of Miami received Title IX federal financial assistance, its close connection with an honor society that will not admit women as members constitutes a violation of Title IX, and all funds are to be terminated unless the University prohibits the society from using its campus "to tap" new members.

Honor societies like Iron Arrow, founded to enhance love of alma mater, will always have a close connection to an educational institution. That is the purpose for which they exist. Faced with the possibility of massive cutbacks in federal aid as punishment for their relationship to honor societies that discriminate on the basis of sex, universities are going to force them out of existence.

As a practical matter, a university cannot afford to do otherwise. Title IX was designed to forbid the use of federal funds to support discrimination in educational programs that receive federal financial assistance. The act does not envision extinction of single-gender honor societies that are not supported directly by federal funds or are not benefited indirectly from the university's receipt of federal funds.[1]

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[1]The University provides no financial assistance to the society so that the university's grant of Title IX funding neither aids the society directly, nor aids it indirectly by releasing other funding sources to the organization.

Further in 1974, when honor societies were made subject to Title IX, Senator Birch Bayh who managed the amendment stated:

A. Petitioner's activities are not within the reach of Title IX.

1. Title IX prohibits sex discrimination in specific education programs receiving federal financial assistance.

Title IX provides in pertinent part:

> (a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination *under any education program or activity receiving federal financial assistance.* 20 U.S.C. §1681. [Emphasis supplied.]

On their face, the statutory terms "program" and "activity" are ambiguous. The word "program", for example, could refer to the full range of courses offered by a university or the word could refer to a specific offering, one of many. Under the former interpretation, a university, as an educational program, could be subjected to regulation on an institution-wide basis if it received Title IX funding. On the other hand, if the word "program" was intended to mean a specific offering of a university, Title IX would not come into play unless the university excluded a person from participation in a particular

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(Footnote 1 Continued)

> I think it is important to recognize that we are only talking about fraternities and sororities where there is a significant contribution from the university. It does not automatically apply to all.
>
> 121 Cong. Rec. 22341 (1975).

program and that program was receiving federal assistance at the time of exclusion.[2]

Section 1682 of the act, the statutory authorization for HEW Regulation 86.31(b)(7), clarifies the ambiguity:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, ... Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity . . . but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found. . . .

Title 20, Section 1682, United States Code (1976).

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[2]For purposes of this analysis, Iron Arrow accepts an interpretation of federal financial assistance that includes not only direct federal assistance, but indirect assistance resulting from the institution's ability to release funds to the activity which it might have had to use for other purposes had the federal funds been unavailable.

Reading the sections together indicates that the statute is designed to regulate the specific uses to which federal funds may be put. There is no significant difference in the language of section 1681 and section 1682 to suggest that "education program" in section 1681 has a meaning different from "education program" in section 1682. Ordinary rules of statutory construction require identical phrases in close statutory proximity, to be given the same meaning and scope.[3] Accordingly, if section 1682 applies to specific programs, so must section 1681. If "education program" in section 1681 had a broader application than the same words in section 1682, HEW'S rulemaking power under section 1682 would be inadequate to its purpose—the effectuation of section 1681.

Had Congress wanted to regulate the associations of an educational institution as the price of federal financial assistance, Title IX would have read:

> No person . . . shall, on the basis of sex, be subjected to discrimination in an education program or activity by a recipient of federal funds or for any education program or activity.[4]

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[3]*Schooler v. United States*, 231 F.2d 560, 563 (8th Cir. 1956) ("In the absence of anything in the statute clearly indicating an intention to the contrary, where the same word or phrase is used in differents parts of a statute, it will be presumed to be used in the same sense throughout . . . .")

[4]Congress used such language in another section of Title IX to prohibit discrimination against the blind in education:

It does not so read. Of the three measures introduced in Congress prohibiting sex discrimination in education—Senator Bayh's original amendment,[5] the Nixon administration bill[6] and Representative Green's measure,[7] the first two were drafted to cover entire institutions. Only Representative Green's, the one finally passed by Congress, limited Title IX's prohibition to an education program or activity.

That Title IX was intended to apply only to those specific programs receiving federal financial assistance, not to all programs, is reflected in the act's legislative history. Representative Green, who authored and managed the House of Representatives' bill that became Title IX, was asked about the scope of the act, whether the act applied to programs not receiving federal assistance:

> Mr. WAGGONNER. Let me clarify a little bit better the point I am trying to make and that is this: This applies, apparently, only to

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(Footnote 4 Continued)

> No person in the United States shall, on the grounds of blindness . . . be denied admission in any course of study by a recipient of federal financial assistance. . . .

20 U.S.C. §1684 (Supp. IV, 1974).

[5]Amendment 398, S. 659, 92d Cong., 1st Sess., 117 Cong. Rec. 70156-57 (1971).

[6]H.R. 5191, 92d Cong., 1st Sess. (1971).

[7]H.R. 7248, 92d Cong., 1st Sess. (1971).

those programs wherein the Federal Government is in part or in whole financing a program or an activity?

Mrs. GREEN of Oregon. With Federal Funds.

Mr. WAGGONER. That is what I mean. With Federal funds.

Mrs. GREEN of Oregon. It is really the same as the Civil Rights Act in terms of race . . . .

Mr. STEIGER of Wisconsin . . . . Mr. Chairman, let me proceed along the line of the gentleman from Louisiana and let me ask the gentlewoman from Oregon (Mrs. Green) for clarification on what I thought I heard. In title IX the gentleman from Louisiana asked relating to a program on activities receiving Federal financial assistance, and under the 'program on activity' one could not discriminate. That is not to be read, am I correct, that it is limited in terms of its application, that is, Title IX to only programs that are federally financed? For example, are we saying that if in the English department, they receive no funds from the Federal Government that therefore that program is exempt?

Mrs. GREEN of Oregon. If the gentleman will yield, the answer is in the affirmative. Enforcement is limited to each entity or institution and to each program and activity.

> Discrimination would cut off all program funds within an institution.

117 Cong. Rec. 39256 (1971).

Congress, therefore, intended to limit the application of Title IX to specific programs receiving federal financial support, rather than extend it to entire institutions. Because Iron Arrow is not an education program and is not receiving federal financial assistance, through the University or one of its programs, its membership policy falls outside the reach of the statute.

Nonetheless, HEW argued and the district and appeals court have agreed that the *relationship* between the university and the society in and of itself constituted a violation of HEW Regulation 86.31(b)(7), promulgated to implement Title IX.

> The relationship of the University and Iron Arrow can almost be described as an incestuous marriage . . . there [has] existed [a holy] matrimony . . . but Iron Arrow [has come] from the very womb of the university . . . was nurtured . . . until it became a bright successful . . . member of the community.[8]

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[8]The district court found that the university had contributed to the
society by providing the society:

1. Plaques and statutes throught the campus.
2. Special recognition on Homecoming Day;
3. A charter given it by the university;
4. Formal sponsorship of the society by presidents of the university;

Iron Arrow Honor Society v. Hufstedler, 449 F.Supp. 496, 504 (S.D. Fla. 1980) (App. 11)

"Iron Arrow simply would not exist but for the University of Miami." The lower courts repeatedly assure the reader of this. One must ask, "So what?" for purposes of Title IX and the regulatory application.

HEW Regulation 86.31(b)(7) reads in pertinent part:

> [A] recipient shall not, on the basis of sex: aid or perpetuate discrimination against any person by providing *significant assistance* to any agency, organization . . . which discriminates on the basis of sex in providing any aid, benefit or service to students. . . .

45 C.F.R. 86.31(b)(7) [Emphasis supplied.]

If Regulation 86.31(b)(7) is to effectuate section 1681, then the terms "significant assistance" must constitute some form of financial assistance; otherwise the regulation violates the limitation inherent in the phrase "receiving federal assistance."

(Footnote 8 Continued)

5. Secretarial services;
6. Mail boxes and labels;
7. Special meeting rooms;
8. A faculty screening committee to proposed new members;
9. Recognition in the university catalogue.

Prior to commencement of this law suit the University ceased providing the society this support as was admitted by all Defendants below.

Because Iron Arrow does not, in fact, receive any financial aid from the University of Miami, its activities are not subject to regulation under Title IX. Prior to instituting this lawsuit, the society had given up any benefits which were arguably flowing from the school. It has, however, continued to aid its alma mater. That appears to be the basis for the finding of the "relationship".

Nowhere in a single public or private document from O.C.R./HEW does the term relationship appear prior to July 30, 1976. "Relationship", an unfortunate word utilized in modern times to describe affectionate pairings of a less-than-publicly-cognizable quality, is an awkward word used by an agency to bridge an awkward situation.

The agency's initial letter set forth as the basis for its determination that there was significant assistance. Mr. Benedict responded on behalf of Iron Arrow through the university that those forms of tangible support quoted in the letter were no longer in existence. Faced with a refutation of the basis for its action, HEW came forth with "relationship". Since that time, Iron Arrow has had to deal with the term even though it does not exist within the statute, the regulation, or HEW's official explanation of that regulation. Nonetheless, both the trial court and the Fifth Circuit treated it as a term with legal reality.

Turning to *Webster's Third International Dictionary,* we find that relationship is:

> "The state or character of being related or interrelated: a connection by way of relation< ~><This text's to what is obvious but difficult

to account for> <Study language~ s>; kinship, consanguinity, affinity ~ < claimed a ~ with the deceased> ; also: specific instance or type of this <a list of family ~ s, a state of affairs existing between those having relations or dealings <improved church ~ s> <a psychologist's study of the mother/child~> a good doctor/patient ~>"

A relationship has to do with the connection or interrelationship or kinship or affinity. Fine. Assistance is help or aid. Relationship is a connection. Help or aid do not equal connection. To help someone is not to be kin to them. These are different concepts. There is no way that the two concepts can be treated as interchangeable. They are not. Each says something different.

Iron Arrow has been subjected to a relationship test. By not defining assistance and by moving into the language of relationship, a test, never contemplated by the statute or regulation, has been imposed on this organization. It is not right. It must fail. The action of both HEW and the lower courts rest on this confusion in terms.

2. The appeals court has allowed an agency regulation with far reaching impact to stand when it is invalid.

This Court has had ample opportunity in recent years to study the various regulations put out by HEW in enforcing Title IX. Again and again, the courts have found that HEW was not authorized by the statute to

issue the regulations it has issued. Since section 1682 places the ultimate power to cut off federal funds to any institution HEW finds to be in noncompliance with Title IX, the agency power is tremendous. When faced with the threat of cut-off of federal monies, the vast majority of school systems and universities simply give in to whatever complaint HEW articulates.

That happened in the case at bar. The university was not willing to risk the millions of dollars of federal monies that come to the school to defend a single organization. Whether one is inspired or uninspired by that organization's "male only" membership policies, one has to admire the persistence with which the organization has fought for its existence against the government.

Looking at a few cases when recipients of federal monies actually did stand up and take the agency to task, the federal recipients were consistently successful in their challenge of the Title IX enforcement policies of HEW. *E.g., Romeo Community Schools v. U.S. Department of HEW,* 600 F.2d 581 (6th Cir. 1979). The court points out that HEW in continuing to argue that section 1681 was intended to prohibit sex discrimination in employment practices in educational institutions does so in the face of near unanimity among the Courts that have considered the issue.

> We find HEW construction of Title IX to be strained. . . . *The concern of this particular statute is not with all discrimination against persons in any way connected with educational institutions which receive federal funding.*

> *Rather, it reaches only those types of disparate treatment which manifest themselves in exclusion from, denial of benefits of, or otherwise result in discrimination on the basis of sex 'under any education program or activity receiving Federal financial assistance . . .' Unless the discrimination relates to a program or activity which receives federal funding, it is not prohibited by §1681.*
>
> 600 F.2d at p. 584 [Emphasis supplied.]

HEW and the lower courts have read Title IX's concern to be just what the Sixth Circuit says it is not: That is, "*all* discrimination against persons in *any way* connected with educational institutions which receive federal funding." The lower courts never reached, nor did HEW in its compliance letters, the issue of whether Iron Arrow is in fact a program or activity which receives federal funding. If it is not, its discriminatory activity is not prohibited by §1681. The lower courts simply state that if the university itself received federal monies which are spent on students, then it is obviously covered in every aspect by Title IX.

The fallacy in not tracing the flow of monies to the specific program or activity challenged is seen by reading section 1682. It states that a department is authorized "to effectuate the provisions of section 1681 of this title *with respect to such program or activity* by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the *financial assistance in connection with which the action is taken.*"

Id. [Emphasis supplied.] The fact that the regulations and their enforcement must be keyed to a specific program is illustrated by the statute's statement that the termination or refusal of federal funds "shall be limited in its effect to the particular program or part thereof, in which such noncompliance has been so found. . . ." 20 U.S.C. §1682 (1976). Although the various letters from H.E.W. put the university on notice of its "noncompliance", H.E.W. in no way explained or tied its sanction power to a limited sanction that would only terminate those federal funds in the "particular program" in which noncompliance had been found. That is because there is no way to do that.

The regulations in the case at bar are, like those in *Dougherty County School System v. Harris*, 622 F.2d 735 (5th Cir. 1980), set forth on the broadest possible rationale to encompass *all* discrimination subjectively held to relate in any fashion to an organization receiving federal funds. The failure of the agency to tie the discrimination and the sanctions on a program-by-program basis has been similarly criticized by the courts in connection with termination of funds under Title VI of the Civil Rights Act. *Board of Public Instruction of Taylor County v. Finch*, 414 F.2d 1068 (5th Cir. 1969). *See also Seattle University v. U.S. Department of H.E.W.*, 621 F.2d 992 (9th Cir. 1980); *Junior College District of St. Louis v. Califano*, 597 F.2d 119 (8th Cir.) *cert. denied.*, 444 U.S. 972, 100 S.Ct 467, 62 L.Ed.2d 388 (1979); *Islesboro School Committee v. Califano*, 593 F.2d 424 (1st Cir.), *cert. denied.*, ____ U.S. ____, 100 S.Ct. 467, 62 L.Ed.2d 387 (1979); *University of Toledo v. U.S. Department of H.E.W.*, 464 F.Supp. 693 (N.D. Ohio 1979); *McCarthy v. Burkholder*, 448 F.Supp. 41 (D. Kansas 1978).

This Court has held in *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 94, 63 S.Ct. 454, 87 L.Ed. 626 (1943), that a Secretary's action cannot be upheld "merely because findings might have been made and considerations disclosed which would [have justified the regulations] . . ." A Secretary must give "clear indication that [he] has exercised the discretion [with] which Congress has empowered [him] . . ." *Id.* at 94-95, 63 S.Ct. at 462, *quoting Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 197, 61 S.Ct. 845, 85 L.Ed. 1271 (1941). The Court must be satisfied that the regulation does not constitute a "clear error of judgment". *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 824, 28 L.Ed.2d 136. *See Home Box Office Inc. v. F.C.C.*, 185 U.S. App. D.C. 142, 167-69, 567 F.2d 9, 34-36, *cert. denied.*, 434 U.S. 829, 98 S.Ct. 111. 54 L.Ed.2d 89 (1977); *National Association of Food Chains, Inc. v. I.C.C.*, 175 U.S.App. D.C. 346, 356, 535 F.2d 1308, 1318 (1976). *Accord, Diplomat Lakewood Inc. v. Harris*, 613 F.2d 1009 (D.C. Cir. 1979).

The lower courts rather surprisingly delighted in the fact that the regulation's language[9] was "capable of widely varying interpretations." [App. at p. 30.] The court indicates that it is "not necessarily an unacceptable condition of such regulations." *Id.* While stating that if the vagueness is sufficient to make inevitable arbitrary enforcement, it should be struck down, the lower courts

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[9]§86.31(b)(7) "[A] recipient shall not, on the basis of sex: Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees. . . ."

find nothing to worry about in the challenged regulation because HEW has explained it.

> Thus, such forms of assistance as faculty sponsors, facilities, administrative staff, etc., may be significant enough to create the nexus and to render the organization subject to the regulation. Such determination will sit on the facts and circumstances of specific situations.

40 Fed. Reg. 24132.

If that explanation was in mandatory terms, perhaps the regulation would be enhanced. But it simply offers a permissive standard. Iron Arrow is living proof that even without "faculty sponsors, facilities, administrative staff, etc." the agency can and will find "significant assistance". The lower courts compounded that error. The explanation does not save the obvious vagueness of the language. This is the very kind of regulation that is abhorred in *P.P.G. Industries Inc. v. Harrison*, 587 F.2d 237 *rehearing denied.*, 591 F.2d 103 (5th Cir. 1979), *reversed on other grounds*, 446 U.S. 578, 100 S.Ct. 1889, 64 L.Ed.2d 525 (1980), a case quoted twice in the district court's opinion.

3. The lower courts have reinterpreted and rewritten the clear Congressional intention to exclude some organizations (those not receiving financial assistance directly or in rare cases indirectly) from the dictates of Title IX.

Chief Judge Dan M. Russell, Jr., of the Southern District of Mississippi, wrote:

> [I]s this discrimination within the purview of 20 U.S.C. §1681? The court thinks not. Without going into the Congressional history of this section it is quite plain, in the growing awareness of women's emergence in every day life to a status compatible with that of men, that the Congress intends federal financial assistance to be available to girls as much as to boys under any education program or activity. This does not require that the recipient erase all differences between the sexes.

Trent v. Perritt, 391 F.Supp. 171, 173 (S.D. Miss. 1975).

Courts are not bound by every statement an agency makes about laws it is supposed to enforce. Using the standards set forth by this Court, the regulation and the lower court's interpretation are neither of compelling weight nor consistent with the "plain meaning" of the language that Congress used in enacting Title IX. *See, e.g., General Electric Company v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 50 L.Ed.2d 343, *rehearing denied.*, 429 U.S. 1979, 97 S.Ct. 825, 50 L.Ed.2d 800 (1977). When the interpretation of an agency regulation is plainly erroneous or inconsistent with its own regulation's language, then the Court must reject that agency's interpretation or a lower court's decision resting on such interpretations. *Morrison & Morrison, Inc. v. Secretary of Labor*, 626 F.2d 771 (10th Cir. 1980). *United States v. Larionoff*, 431 U.S. 864, 872, 97 S.Ct. 2150, 2155, 53 L.Ed.2d 48 (1977).

Nowhere does the statute nor the regulation suggest that *all* organizations that exist within a private university's community will be controlled by Title IX if

that university received federal funds. In fact, the opposite is made clear both in the text of the statute and in the language of the regulation itself. Only those organizations which are provided with significant assistance from a federal recipient shall be regulated under the workings of Title IX of the regulation in question. If this is true, then the regulation contemplates organizations which do not receive significant assistance and which thus, happily or unhappily as your perspective may be, may continue to go forward and without sanction discriminate in their membership policies.

Rather than "completely eliminating discrimination" Title IX sought as Chief Judge Russell stated, to see that "federal financial assistance [is] available to girls as much as to boys under any education program or activity." *Trent v. Perritt*, 391 F.Supp. 171, 173 (S.D. Miss. 1975). Neither Iron Arrow nor the University of Miami has kept one penny of federal financial assistance from being available to the female students at the university as much as to the male students there. Iron Arrow has not been significantly assisted by the University—although it admits that it has assisted, probably in significant measure, the University. Iron Arrow is after all, an organization founded to enhance "love of alma mater". When HEW said to the school that the University of Miami assisted Iron Arrow—Iron Arrow refuted those charges. HEW then said, "Okay, but you are still related to the University of Miami, so you lose."

Unless one brings a preconceived opinion that all organizations that discriminate in membership policy are in fact within the purview of Title IX, Iron Arrow

falls logically and legally, outside that statute's workings. *If any organization is untouched by Title IX's dictates* —then Iron Arrow is.

The HEW Fact Sheet of June, 1975 was admitted by the Federal Defendants/Appellees in their answer. It said:

> However, a non-exempt organization whose membership was restricted to members of one sex could adhere to its restrictive policies and operate on the campus of a recipient university, if it receives no assistance from the university.

Nothing could make it plainer that mere presence, even operation on-campus, cannot in and of itself be assistance. Iron Arrow wants to continue to go on campus twice a year and "tap". It wants to stand on the mound, beat its tom-tom drum, and place the symbol of the group on the shoulder of the new member. It asks no aid or help from the university—merely the school's passive allowance of the continuation of the organization's tradition. Does government legitimately disallow this? Has HEW not reached too far?

CONCLUSION

For the reason stated above, we urge this Court to grant a writ of certiorari to review the opinion in this case so that complaints pending before or threatened by HEW against other similarly situated honor societies may be resolved lawfully.

Respectfully submitted,

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CERTIFICATE OF MAILING

I, Elizabeth J. duFresne, an attorney admitted to practice before the Supreme Court of the United States, do swear and certify that I have this 31th day of October, 1981, placed the attached Petition for a Writ of Certiorari in the Office of the United States Postal Service located at the Miami International Airport, Miami, Florida. Copies were appropriately addressed to the Clerk of the Court and to the opposing attorneys with first class postage prepaid within the time allowed for filing.

Elizabeth J. duFresne

COUNTY OF DADE
STATE OF FLORIDA

I hereby notarize that Elizabeth J. duFresne, personally known to me, did appear before me and swear to the above Certificate of Mailing.

Notary Public

10/31/81

Appendix

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IRON ARROW HONOR SOCIETY, a "tap" or recognition association for men, et al.,
Plaintiffs-Appellants,

v.

Richard S. SCHWEIKER, Secretary of the Department of Health and Human Services, et al.,
Defendants-Appellees.

No. 80-5663.

United States Court of Appeals,
Fifth Circuit.
Unit B

Aug. 3, 1981.

Honor society brought action seeking to enjoin Department of Health, Education and Welfare from issuing or interpreting regulation in such way as to deter university from permitting society to conduct certain functions on university campus, and seeking also declaration of rights. On remand, after previous appeal, 597 F.2d 590, the United States District Court for the Southern District Florida, at Miami, Eugene P. Spellman, J., 499 F.Supp. 496, entered judgment from which the society appealed. The Court of Appeals, Tuttle, Circuit Judge, held that: (1) regulation under which HEW threatened termination of substantial contribution of federal funds to University of Miami on ground that university had given substantial assistance to honorary recognition society which elected only men to membership was proper as effectuating provisions

of civil rights statute and was consistent with achievement of objectives of the statute authorizing the financial assistance in connection with which the action was taken, and (2) where it was clear that honorary recognition society of university could not exist without university, there was "substantial assistance" from university to society, and injunctive relief was properly refused against threatened termination of substantial contribution of federal funds from HEW to university.

Affirmed.

1. Colleges and Universities —4

Regulation under which former Department of Health, Education and Welfare threatened termination of substantial contribution of federal funds to University of Miami on ground that university had given substantial assistance to honorary recognition society which elected only men to membership was proper as effectuating provisions of civil rights statute and was consistent with achievement of objectives of the statute authorizing the financial assistance in connection with which the action was taken. Education Amendment of 1972, §§901 et seq., 902, 20 U.S.C.A. §§1681 et seq., 1682.

2. Civil Rights —9.5

Where it was clear that honorary recognition society of university could not exist without university, there was "substantial assistance" from university to society, which elected only men to membership, and injunctive relief was properly refused against threatened termination of substantial contribution of federal funds from former

Department of Health, Education and Welfare to university. Education Amendments of 1972, §§901 et seq., 902, 20 U.S.C.A. §§1681 et seq., 1682.

Appeal from the United States District Court for the Southern District of Florida.

Before TUTTLE, RONEY and ANDERSON, Circuit Judges.

TUTTLE, Circuit Judge:

This is an appeal from the judgment of the trial court, 499 F.Supp. 496, dismissing a complaint seeking an injunction to forbid the former Department of Health, Education and Welfare from terminating its substantial contribution of federal funds to the University of Miami. The termination threat arose from the fact that Iron Arrow is an honorary-recognition society of the University which elects only men to membership and which the Secretary of HEW had determined gave "substantial assistance" to Iron Arrow.

There are two substantial questions raised by the Society which must be resolved on this appeal: 1) Were the HEW regulations upon which the Secretary acted in excess of the authorization contained in the statute; and 2) Did the University actually contribute "substantial assistance" to the Society?

The regulation in effect at the time of the threatened cutoff of federal funds from the University was Section 86.-31(b)(7) which provides that:

Except as provided in this subpart, and providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex: . . .

(7) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees.

Statutory jurisdiction for the issuance of the regulation is 20 U.S.C. §1682. It authorizes certain federal agencies, including HEW to issue regulations to "effectuate" the provisions of §1681.[1] The enforcement provisions of §1682 provide:

Compliance with any requirement adopted pursuant to this section may be effected 1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the . . . recipient as to whom such a finding has been made, and shall be limited in its effect

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[1]Title IX provides in pertinent part:

(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.

20 U.S.C. §1681.

to the particular program, or part thereof, in which such noncompliance has been so found . . . .

20 U.S.C. §1682.

The Secretary explained the import of the regulation in the following manner:

> Section 86.31(b)(7) prohibits a recipient from assisting another party which discriminates on the basis of sex in serving students or employees of that recipient. This section might apply, for example, to financial support by the recipient to a community recreational group or to official institutional sanction of a professional or social organization. Among the criteria to be considered in each case are the substantiality of the relationship between the recipient subject to the regulation and the other party involved, including the financial support by the recipient, and whether the other party's activities relate so closely to the recipient's educational program or activity, or to students or employees in that program, that they fairly should be considered as activities of the recipient itself. (Under §86.6(c), a recipient's obligations are not changed by membership in any league or other organization whose rules require or permit discrimination on the basis of sex).

39 Fed. Reg. 22229 (1974).

The effect of this interpretation of the regulation is to say that although any cutoff of funds is normally

to be limited to the program or activity of the recipient in which the discrimination occurs, a different standard applies where the recipient gives substantial assistance to what is called by the parties an "outside" organization in which event the Secretary is to consider the substantiality of the relationship between the University and the other party and whether the other party's activities relate so closely to the University's educational program or activity, or to students or employees in that program, that these activities of the University itself. In such event, the regulation would permit the cutoff of federal funds to the University.

[1] We conclude that this regulation clearly "effectuates" the provisions of §1681 with respect to its programs and activities and that it is "consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which" the action is taken. As this Court has said in *Coca-Cola Co. v. Atchison T. & S.F.Ry.*, 608 F.2d 213, 222 (5th Cir. 1979): "Courts generally grant 'great deference' to an agency's interpretation of its enabling statute." *See also Dougherty Co. School System v. Harris*, 622 F.2d 735, 737 (5th Cir. 1980) where we stated that the Secretary is entitled to "great latitude" in effectuating Title IX, 622 F.2d 735, 737 (5th Cir. 1980).

The original notification from the Secretary to the University outlined the nature of the "substantial assistance" which Iron Arrow received from the University in the following discussion:

> The assistance to the Iron Arrow Honor Society is of two types. First, Iron Arrow benefits from recognition and identification with the

University, thereby enhancing its prestige. Second, Iron Arrow benefits from tangible support such as secretarial service, alumni mailings, and the use of meeting rooms.

The following background information, revealed in the investigation, is evidence of the Iron Arrow's recognition by and identification with the University: The Iron Arrow Society was established in 1926 by Dr. Bowman Foster Ashe, the first President of the University of Miami. In 1950, President Ashe gave the Society a University Charter and "signed into law" a Constitution for the organization, affixing his signature and title as President. According to the organization's head, Iron Arrow is the only campus group to receive a charter from the University.

The Society's constitution, as amended, allows for members to be either male students, faculty, administrative officials, staff or alumni of the University. It is stipulated that members "shall be selected on the prime basis of character and love for Alma Mater, with strong secondary criteria of leadership, scholarship, and humility as defined in the Ritual Book of the Tribe." The now operative amendments of the Society's constitution were "signed into law, A.D. 1971" by the current chief, or head, of the Society, and by you, the President of the University, with your title so designed.

A brochure prepared by the Society says that "Iron Arrow remains the University of Miami's

first and most esteemed tradition." The purpose of Iron Arrow as stated in the University's directory of student organization is "to recognize junior and senior men, faculty, staff, and alumni for meritorious achievement and outstanding contributions to the University and its community." In the University's catalogue, reference is made to Iron Arrow as "the highest recognition society for men."

The prestigious position of Iron Arrow is further seen in the location of a monument which stands on a knoll outside the student union building. A plaque thereon says, in part: "Iron Arrow—founded in 1926 as the University's highest honor."

Among other visible signs of Iron Arrow's prestige is a plaque on the wall just inside the entrance to the Ashe Building which houses administrative offices. The names of all members of Iron Arrow are included on additional mounts on the wall. In front of the plaque is a life-size statute of Dr. Ashe, the University's first President, and the founder of Iron Arrow.

Nearly all of the faculty and students interviewed by the investigators confirmed the fact that Iron Arrow is looked upon as the most prestigious organization on campus, and, as such, is particularly advantageous in employment opportunities.

In addition to the above described recognition received by Iron Arrow from the University,

the investigation revealed evidence of tangible support of Iron Arrow from the University. For example, the alumni association does mailings and covers postage for Iron Arrow material, although the organization itself pays for printing costs. The Student Activities Office provides secretarial support. Furthermore, the University assists Iron Arrow by handling three separate accounts from them in the University's finance office. Iron Arrow has a room in the student union building with its name outside the door. Additionally, Iron Arrow utilizes a projection room in the athletic building where it also maintains certain objects or symbols pertaining to the organization.

In addition to a faculty member regularly serving as advisor to Iron Arrow, there is further substantial support for the Society by the University in the various procedures and ceremonies associated with the selection of members. There are "screening committees" in each school of the University, composed of student and faculty members. The "Tapping" ceremony occurs during classes so that, when a faculty member is tapped for membership, he is led away by Iron Arrow members to join others in ceremonies at the monument outside the student union building.

[2] Although Iron Arrow and the University agreed thereafter that the latter would cease furnishing all of the physical assistance outlined in the foregoing letter with the exception of the use of the mound in front of

the student union building and the statute there for "tapping" for new members, the Secretary insisted that the non-tangible support was still sufficient to constitute "substantial assistance." We have recited the nature of this non-tangible support to indicate the basis on which the Secretary could well conclude that the activities of Iron Arrow in its sex discrimination policies were imputable to the University itself. Iron Arrow simply would not exist but for the University of Miami. The University created the honorary society apparently as an activity of great importance in the building of student morale and leadership. This cannot be denied. Although the University could exist without Iron Arrow, Iron Arrow could not exist without the University. The Society's argument that we should not consider this "substantial assistance" enough to bring it within the regulation simply falls of its own weight.

While we do not reach the ultimate question as to what, if anything, would be done by the University to completely withdraw assistance from Iron Arrow in order to bring itself into compliance without abandoning its males-only policy, we conclude that we are unable to imagine any continued association of the Society with the University of Miami that, in light of its history, would not constitute a continuation of the "substantial assistance" which the trial court found to exist.

We find that no proper final order has been entered in this case under F.R.C.P. 58. The order of dismissal is therefore not appealable. However, the denial of the permanent injunction is appealable and that order we now affirm.

The judgment is AFFIRMED.

IRON ARROW HONOR SOCIETY, a "tap" or recognition association for men; and John I. Benedict, individually and as Chief of Iron Arrow Honor Society,

Plaintiffs,

v.

Shirley M. HUFSTEDLER, Secretary of the Department of Education; William H. Thomas, Director, Office for Civil Rights, Department of Health, Education and Welfare (Region IV) et al.,

Defendants.

NO. 76-1850-Civ-EPS.

United States District Court,
S. D. Florida,
Miami Division.

Aug. 12, 1980.

Honor society brought action seeking to enjoin the Department of Health, Education and Welfare from issuing or interpreting regulation in such a way as to deter university from permitting society to conduct certain functions on university campus, and seeking declaration of rights. On remand, after reversal, 597 F.2d 590, of dismissal of the complaint against HEW by James Lawrence King, J., the District Court, Spellman, J., held that: (1) Congress' authorization of regulatory jurisdiction to effectuate statutory requirement that no person shall be discriminated against on the basis of sex in any education program or activity receiving federal financial assistance was not exceeded by regulation precluding educational institutions receiving such

assistance from providing significant assistance to any organization discriminating on the basis of sex in providing any aid, benefit or service to students or employees, which reaches organizations that do not directly receive federal support; (2) regulation was not impermissibly vague or arbitrary; (3) university was providing "significant assistance" to plaintiff honor society; and (4) enforcement of the regulation as to plaintiff honor society based on unsolicited complaint from the university community was not arbitrary and discriminatory in light of evidence as to extraordinary value of membership in the society to career advancement.

Declaration accordingly.

1. Administrative Law and Procedure —760

Civil Rights —9.5

District court could not simply substitute its judgment for that of agency, and thus regulation of the Department of Health, Education and Welfare and HEW's interpretation of that regulation would be upheld unless they were unreasonable, arbitrary, beyond statutory jurisdiction or inadequately consistent with procedural requirements. 5 U.S.C.A. §706.

2. Health and Environment —20

Issuance of challenged regulation by the Department of Health, Education and Welfare was final agency action, and the agency's stated interpretation of the regulation was also final, given its nonreviewability by persons challenging it other than through the lawsuit,

and thus questions presented were ripe for judicial review. 5 U.S.C.A. §704.

3. Civil Rights —9.5

Congress' authorization of regulatory jurisdiction of the Department of Health, Education and Welfare to effectuate statute prohibiting sexual discrimination in any educational program or entity receiving federal assistance was not exceeded by regulation reaching honor societies not directly receiving federal support. Education Amendments of 1972, §§901-903, 20 U.S.C.A. §§1681-1683.

4. Administrative Law and Procedure —390

If standards governing application of regulation were so vague as to make inevitable arbitrary enforcement of the regulation, regulation could be struck down as being in violation of the Administrative Procedure Act. 5 U.S.C.A. §706.

5. Civil Rights —9.5

Department of Health, Education and Welfare regulation providing that educational institution receiving federal assistance shall not provide significant assistance to any organization which discriminates on basis of sex in providing aid, benefit or service to students or employees was not impermissibly vague in light of fact that, simultaneously with promulgation of the regulation, HEW established standards which would guide enforcement.

6. Civil Rights —9.5

Department of Health, Education and Welfare regulation providing that educational institution which receives federal assistance shall not provide significant assistance to any agency, organization or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees is not arbitrary, in that it is not contrary to, but instead is fully consistent with, governing statutes. Education Amendments of 1972, §§901.-903, 20 U.S.C.A. §§1681-1683.

7. Civil Rights —9.5

University was providing "significant assistance" to honor society within meaning of HEW regulation precluding educational institution receiving federal assistance from providing such assistance to organization which discriminates on the basis of sex in providing any aid, benefit or service to students or employees, in light, among other things of university's allowing society to use university property and special recognition given the society by university, and thus university was not in compliance with the regulation; that the society may have given more than it received from university supported rather than weakened such conclusion. Education Amendments of 1972, §§901, 902, 20 U.S.C.A. §§1681, 1682.

See publication Words and Phrases for other judicial constructions and definitions.

8. Constitutional Law —278.5(1)

Fact that Department of Health, Education and Welfare chose to enfore regulation precluding educational institutions receiving federal assistance from providing significant assistance to organizations discriminating on the basis of sex in providing aid, benefit or service to students or employees by seeking voluntary compliance by university rather than formal hearing process did not deny due process to honor society which was the object of the proceeding. U.S.C.A.Const. Amend. 14.

9. Civil Rights —9.5

Enforcement against honor society on the basis of unsolicited complaint from university community of HEW regulation providing the educational institution receiving federal assistance shall not provide significant assistance to any organization which discriminates on the basis of sex in providing any aid, benefit or service to students was not arbitrary or discriminatory in light of evidence as to the extraordinary value of membership in the society in question to career advancement. Education Amendments of 1972, §§901, 902, 20 U.S.C.A. §§1681, 1682.

10. Civil Rights —9.5

Should university decide to resume some contacts with honor society which precluded women from membership, the Department of Health, Education and Welfare could not consistently with the Education Amendments of 1972 being hearing to terminate the university's general funding until HEW first sought

voluntary compliance. Education Amendments of 1972, §902, 20 U.S.C.A. §1682.

Elizabeth Du Fresne, Du Fresne & Du Fresne, Miami, Fla., for plaintiffs.

Alexander Ross, Dept. of Justice, Washington, D.C., for defendants.

ORDER AND MEMORANDUM OPINION

SPELLMAN, District Judge.

> Early in the morning, while the sky is still pale with night and the dew still wet on the grass, Iron Arrows begin to congregate at the tapping mound. There, on a small knoll beneath a shady ficus tree is the Iron Arrow monument. A few sticks of wood are placed in the firebowl, and soon the smell of smoke begins to drift across the campus. It is the tapping day. (Plaintiffs' Complaint p. 3).

Thus begins the tapping ceremony of the Iron Arrow Honor Society, an organization steeped in tradition and proud of its long association with the University of Miami. A major part of the tradition of the organization is its male—only membership policy. With the inexorable movement toward recognition and advancement of women's rights in the past decade, Iron Arrow's exclusive membership policy has naturally met strong opposition and hostility, yet the organization has steadfastly refused

to admit women, even when the federal government's threatened withdrawal of access to the federal fisc forced the University of Miami to disassociate itself from Iron Arrow. Resisting this intrusion by the federal government, which was apparently intended through indirection to work a transformation in the sexual attitudes of Iron Arrow, the organization has instead fought back by filing the present action.

In this action, the plaintiffs seek to enjoin the federal defendant from issuing or interpreting its Regulation 86.31(b)(7) in such a way as to deter the University of Miami from permitting the Iron Arrow Honor Society to conduct certain functions on the University campus. The plaintiffs also seek a declaration of their rights with regard to the issuance and enforcement of Regulation 86.31(b)(7). Jurisdiction is founded on 28 U.S.C. §§1331 and 2201, 20 U.S.C. §§1683 and 5 U.S.C. §701, et seq.

This suit was originally brought by the plaintiffs in October, 1976 against defendants Department of Health, Education, and Welfare (hereafter "H.E.W.") and the University of Miami. The District Court heard the case upon the plaintiffs' demand for a temporary injunction, denied temporary relief, and subsequently dismissed the action as to the University, stating that the plaintiffs have no federal cause of action against the University. The Court also dismissed the complaint as to H.E.W. on the ground that the plaintiffs lacked standing to complain of an H.E.W. action which only indirectly affected the plaintiffs. On appeal, the decision of the District Court was affirmed as to the dismissal of the complaint against the University, but reversed

as to the dismissal of the complaint against H.E.W., 597 F.2d 590 (5th Cir. 1979).

Referring to a statement made by the University which this Court has been unable to find in the record or the pleadings, the Fifth Circuit held:

> In light of the unequivocal statement of the position of the University of Miami that but for the action of the Secretary of Health, Education and Welfare it would not have and would not in the future bar the Iron Arrow Honor Society from its campus, the decision of the district court on standing of the Society is reversed.

Id., at 590.

The case is presently before this Court on cross-motions for summary judgment. All the parties agree that there are no factual issues to be resolved. Despite the previous disimssal of the University defendant, the Court has *sua sponte* joined the University of Miami as an indispensable party in order to assure that adequate relief can be afforded by the decision of this Court. Fed.R. Civ.Proc. 19.

The facts are undisputed. In 1973, the Office of Civil Rights, a subdivision of H.E.W., received a personal complaint charging that Iron Arrow Honor Society (hereafter "Iron Arrow") systematically discriminated against females by excluding them from membership in the society. The complaint also charged that Iron Arrow discriminated against American Indians, both in membership policies and by adopting certain Seminole

Indian customs and attire for the society's activities. H.E.W. notified the University of Miami that these complaints were being investigated, and in October, 1973 H.E.W. informed the University that the complaint as to discrimination against American Indians was not supported by the facts.

> We do not find evidence to support a claim that the Society's use of Indian ritual and appurtenances is, per se, demeaning of either Seminole or Mikasukee Indians or Indians in general. Indeed, our investigation shows that qualities of life and philosophy portrayed in the Society's ritual show Indians in what must be considered a positive or favorable light.

(Letter of William H. Thomas, Office of Civil Rights, to the University of Miami, dated October 25, 1973).

The University was simultaneously informed that consideration of the sex discrimination claim had been postponed.

> Our resolution of the sex discrimination aspect of this complaint will have to await the issuance of guidelines for the implementation of Title IX of the Education Amendments of 1972. These should be ready sometime in the fall, at which time we will pursue our investigation into the status of the Iron Arrow Society and the University's obligations to comply with the requirements of Title IX and

implementing rules and regulations issued pursuant to the legislation.

Id.

H.E.W. regulations implementing the Title IX legislation were subsequently issued and became effective on July 21, 1975. On May 25, 1976, H.E.W.'s Office of Civil Rights informed the University that it had concluded its investigation of Iron Arrow and found that the University was in violation of H.E.W. Regulation 45 C.F.R. 86.-31(b)(7), which states.

> . . . a recipient shall not, on the basis of sex:
>
> Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees: . . .

H.E.W. stated to the University,

> Accordingly, we are informing you that in order for the University of Miami to fulfill its obligations under Title IX, it must either require the Iron Arrow Honor Society to eliminate its policy of excluding women or discontinue its support of the Iron Arrow Society.

(Letter of William H. Thomas, Office of Civil Rights, to the University of Miami, received May 25, 1976).

The facts relied on in the above letter for the conclusion that the University provided "significant assistance" to Iron Arrow include the following: the University's provision of secretarial services, alumni mailings, and meeting rooms to Iron Arrow; the establishment of Iron Arrow by the founding President of the University of Miami in the year that the University was founded; the signature of the President of the University on the Iron Arrow constitution; the charter issued to Iron Arrow by the University; reference in the University catalogue to Iron Arrow as "the highest recognition society for men"; the existence of a monument to Iron Arrow on a mound outside the University's student union building; other campus plaques and statutes honoring Iron Arrow and its members; the University's acquiescence in the association of the University faculty as advisors and as screening committees for admission of new members to the society; and the Iron Arrow tapping ceremony, which was regularly conducted on the University's campus.

In June, 1976, the University requested additional time before compliance with the requirements of Title IX was ordered and requested of H.E.W. that it consider Iron Arrow's contention that it no longer received significant assistance from the University. The extension of time was granted, but reconsideration of Iron Arrow's position did not alter H.E.W.'s findings, and H.E.W.'s position with regard to seeking compliance by the University remained unchanged. (Plaintiffs' exhibit #3).

In September, 1976, after meetings with Iron Arrow members, President Stanford of the University of Miami requested of H.E.W. an additional extension of time before any action was taken against the University.

H.E.W. responded by allowing an extension until December 15, 1976, upon the condition that the campus tapping ceremony of Iron Arrow could not take place until the compliance question was resolved.

The University thereupon prohibited Iron Arrow from performing its tapping ceremony on the campus. Iron Arrow responded by bringing this lawsuit.

I.

Scope of review.

The regulation which H.E.W. relied on in seeking compliance by the University was adopted pursuant to 20 U.S.C. §1682, which states, in pertinent part,

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract . . . is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with the statute authorizing the financial assistance in connection with which the action is taken.
>
> . . . Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been made,

and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been found . . . . *Provided however*, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means.

The statute to be implemented, 20 U.S.C. §1681, provides, in pertinent part,

(a) No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that: . . .

(6) this section shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26, the active membership consists primarily of students in an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one

sex and principally to persons of less than nineteen years of age;

. . . . .

The plaintiffs present no constitutional challenge to Congress' delegation to H.E.W. of the power to adopt regulations consistent with the statutory purpose. Moreover, the regulations were issued in full compliance with provisions regarding notice and comment rule-making in the Administrative Procedure Act, 5 U.S.C. §553, and the plaintiffs do not challenge the procedure followed in issuing Regulation 86.31(b)(7). 40 Federal Register 24128.

The plaintiffs' challenge to the regulation in question is based on the grounds that it exceeds the statutory delegation of authority, or is arbitrary, capricious, or an abuse of discretion. Plaintiffs also contend that H.E.W.'s interpretation of its regulation is unreasonable or arbitrary, and that plaintiffs were denied a hearing or other procedural safeguards available under 5 U.S.C. §701, et seq.

Under the Administrative Procedure Act, 5 U.S.C. §706, this Court's scope of review of administrative action is broad enough to encompass all of the relief sought by the plaintiffs including declaratory relief. The statute requires this court, "[t]o the extent necessary to decision and where presented . . . [t]o decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of an agency action." 5 U.S.C. §706.

[1] This Court may not, however, simply substitute its judgment for that of the agency. H.E.W.'s regulation and its interpretation of that regulation will be upheld unless they are unreasonable, arbitrary, beyond statutory jurisdiction, or inadequately consistent with procedural requirements. 5 U.S.C. §706; *P.P.G. Industries, Inc. v. Harrison*, 587 F.2d 237, reh. denied 591 F.2d 102 (5th Cir. 1979), reversed on other grounds ____ U.S. ____, 100 S.Ct. 1889, 64 L.Ed.2d 525 (1980); *Bank of Commerce of Laredo v. City National Bank of Laredo*, 484 F.2d 284 (5th Cir. 1973), cert. denied 416 U.S. 905, 94 S.Ct. 1609, 40 L.Ed.2d 109; *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).

[2] Plaintiff's final jurisdictional hurdles involve the related issues of ripeness, finality of agency action and exhaustion of administrative remedies. The plaintiffs are not presently entitled to any further administrative review of their claim. 20 U.S.C. §1682. Moreover, even if such review were available, the issuance of the challenged regulation is itself a final agency action under 5 U.S.C. §704, and H.E.W.'s stated interpretation of the regulation is also final, given its non-reviewability by the plaintiffs other than through this lawsuit. *Romeo Community Schools v. U. S. Dept. of Health*, 438 F.Supp. 1021, 1027 (E.D.Mich. 1977) affirmed 600 F.2d 581 (6th Cir. 1979). Thus, the case is appropriate for decision by this Court and the questions presented are ripe for judicial review *Abbott Laboratories v. Gardner*, 387 U.S. 136, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967).

II.

Statutory jurisdiction for the issuance of the regulation.

[3] 20 U.S.C. §1682 authorizes certain federal agencies, including H.E.W., to issue regulations to "effectuate" the provisions of 20 U.S.C. §1681, which prohibits sexual discrimination in any educational program or activity receiving federal assistance. The plaintiffs do not directly claim that Regulation 86.31(b)(7), enacted pursuant to §1682, does not effectuate §1681, but rather that "the Congress did not intend that honor and recognition societies operating, as Plaintiff, in independent orbit about a university, be denied the right to exclude persons based on sex . . ." (Complaint p. 9).

This Court must examine the regulation to determine if it effectuates the substantive statute by reaching discrimination in an organization which does not directly receive federal support. To do so, it is necessary to define the effects which §1681 is intended to bring about. Section 1681 is patterned after 42 U.S.C. §2000d, Title VI of the Civil Rights Act, which seeks to eliminate federal support of racial discrimination in American society. The Supreme Court, in *Cannon v. University of Chicago*, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), found the thrust of §1681 to be equally clear; the statute seeks to eliminate federal support of educational programs and activities which sexually discriminate against students. *Id.* at 704, 99 S.Ct. at 1961.

This goal is, in turn, part of the broader social objective of completely eliminating invidious discrimination on the basis of sex. Elimination of racial

discrimination through integration in the schools has been a constant commitment of this country since 1954. *Brown v. Board of Education of Topeka*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed.873 (1954), and it was advanced by the 1964 Civil Rights Act. It is widely believed that full equality of educational rights and opportunities will lead to wide-ranging social and economic advancement by persons who have in the past been treated as second-class citizens. This belief in the power of education to eliminate the effects of past discrimination and inequalities plays an important part in the structure of American values, and this importance was reflected in the legislative history of the Title IX legislation. 1972 U.S.Code Cong. and Admin. News, p. 2462, et seq.

House Report No. 554 noted extensive discrimination by American universities in their admissions policies and also focused on the issue of discrimination suffered by women faculty at colleges and universities. *Id.* at 2512. The report emphasizes the close relationship between Title VII of the Civil Rights Act of 1964 and the present legislation, especially as it relates to equalizing employment opportunities for women. *Id.* at 2512.

This career advancement notion was reinforced by Senator Bayh's statement regarding the 1974 amendment of §1683 to exclude social fraternities, the YMCA, YWCA, Girl Scouts, Boy Scouts, and Camp Fire Girls, as well as high school youth service groups from the statute's prohibition. "[T]his exemption covers only social Greek organizations; it does not apply to professional fraternities or sororities whose admission practices might have a discriminatory effect on the future career opportunities of a woman." Dec. 16, 1974, Cong. Record at s21568.

The defendant contends that the non-inclusion of one-sex honor societies from the 1974 exemption indicates Congressional intent to reach such organizations through §§1681 and 1682. While the limited nature of the exemption precludes any affirmative reading of the amendment, certainly the exemption is not inconsistent with a Congressional intent to reach sexually discriminatory honor societies in close association with a university receiving federal assistance.[1]

The H.E.W. regulation 86.31(b)(7) states that educational institutions which receive federal assistance shall not perpetuate sexual discrimination by providing significant assistance to an organization which discriminates in providing any aid, benefit, or service to students. H.E.W. explained its regulation as follows in the Federal Register:

> The language in subparagraph 86.31(b)(7) has been in response to comments in order to clarify the Department's position when agencies, organizations or persons not part of the recipient would be subject to the requirements of the regulation. Some of these "outside" organizations have been exempted from Title IX with respect to their membership policies by a recent

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[1]In light of the Fifth Circuit's recent opinion in *Dougherty County School System v. Harris*, 622 F.2d 735 at 737, this Court here notes its finding, implicit in the present opinion but apparently explicit required by the *Dougherty* opinion, that the University of Miami is an "educational program or activity" under the terms of 20 U.S.C. §§1681 and 1682, and that Regulation 86.31(b)(7) was intended to and does apply only to such specific programs as, for example, universities which receive general grants of federal support.

> amendment to the Statute which was enacted in late 1974. This amendment is reflected, as already noted, in §86.14 which exempts social fraternities . . . . Other groups, however, such as business and professional fraternities and sororities and honor societies continue to be covered. The regulation provides that if the recipient furnishes the "outside" agency or organization with "significant assistance," the "outside" agency or organization becomes so connected with the education program or activity of the recipient that any discriminatory policies or practices for which it is responsible become attributable to the recipient. [40 Federal Register 24132]

The standards articulated in H.E.W.'s explanation are more rigorous in requiring a close connection between recipient and honor society than is the nexus requirement employed in state action analysis for the purpose of enforcing the Fourteenth Amendment to private persons and organizations. See *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961).

As a matter of law, the Court finds that this regulation, though it may reach activities once-removed from direct federal assistance, is nevertheless useful and necessary to the effectuation of 20 U.S.C. §1681, which demands an end to federal governmental support of the perpetuation of discrimination against women in educational institutions. Sexually discriminatory honor societies significantly assisted by federally supported universities perpetuate sexual discrimination. Thus,

Congress' authorization of regulatory jurisdiction to effectuate 20 U.S.C. §1681 was not exceeded by H.E.W. Regulation 86.31(b)(7), which reaches organizations that do not directly receive federal support.

III.

Issues of vagueness, reasonableness and arbitrariness of the regulation.

[4] The regulation purports to reach organizations which sexually discriminate in providing any "aid, benefit, or service" to students and to which a recipient of federal support provides "significant assistance". The two above-quoted terms are capable of widely varying interpretations. This is not necessarily an unacceptable condition of such regulations. However, if the Court were to find that these standards were so vague as to make inevitable the arbitrary enforcement of the regulation, the regulation could be struck down as being in violation of the Administrative Procedure Act, 5 U.S.C. §706. See *PPG Industries* . . ., supra. Also, if the agency enforcing the regulation interpreted these standards so unreasonably that the standards no longer guided agency discretion, the regulation could be declared invalid.

[5] Neither of these problems exist as to the present regulation. Simultaneously with the promulgation of this regulation, H.E.W. established the standards which would guide its enforcement of the regulation.

H.E.W.'s explanation stated:

> Thus, such forms of assistance as faculty sponsors, facilities, administrative staff, etc., may be significant enough to create the nexus and to render the organization subject to the regulation. Such determinations will turn on the facts and circumstances of specific situations.

40 Federal Register 24132.

H.E.W. also indicated that it considered honor societies within the scope of the regulation.

These interpretations eliminate much of the vagueness of the language in the regulation. Moreover, they are reasonable guides to the exercise of administrative discretion in enforcing the regulation. So long as the agency devises clear standards to guide its actions, this Court will subject agency action to scrutiny on the basis of those standards.

[6] On the question of arbitrariness, the Court finds that the regulation is not contrary to, but is instead fully consistent with, governing statutes. The Court also finds that the regulation, as limited by H.E.W.'s interpretive explanation, is not unduly vague.

IV.

Application of the regulation to the present case—the issue of significant assistance.

In 1976, the University of Miami was a recipient of federal funds administered by H.E.W. Iron Arrow

provided aid, benefits and services to selected students of the University of Miami. Iron Arrow openly discriminated in its admission policies and practices on the basis of sex. Thus, Regulation 86.31(b)(7) was applicable to the University's relationship to Iron Arrow if the University provided "significant assistance" to Iron Arrow.

A review by this Court fails to disclose any prior occasion where the particular regulation in question has been judicially interpreted and from which this Court could secure some guideline in dealing with the facts and circumstances surrounding this case.

In *Webster's Third New International Dictionary*, "significant" is defined as "having or likely to have influence or effect: deserving to be considered: IMPORTANT, WEIGHTY, NOTABLE (even though the individual results may seem small, the total of them is [significant]—F. D. Roosevelt."

"Significant assistance", according to H.E.W., can be of two forms: tangible support or intangible support. Tangible support includes direct financial assistance, the provision of facilities, equipment, or real property, secretarial and management services. Intangible support includes actions which identify the university with the discriminatory organization or bestow recognition upon the organization, such as provision of a faculty sponsor or advisor.

In the instant case, the Court finds its role as harbinger in seeking to interpret the term "significant assistance" and apply that term to the relationship between the University of Miami and the Iron Arrow

Society to be less than an enjoyable task. Altnough federal jurisdiction has never extended to actions brought for dissolutionment of marriage, this Court cannot help but feel the same burden that must be placed on chancellors who preside over such cases when it is acknowledged that the decision that must ultimately be reached will place an indelible scar on the parties before the Court. The relationship of the University and Iron Arrow can almost be described as an incestuous marriage. Not only has there existed matrimony, scheduled to culminate in a golden wedding anniversary which never took place, but Iron Arrow came from the very womb of the University of Miami, was held close to its bosom and was nurtured as a child until it became a bright, successful and outstanding member of the community, looked upon by its parent with pride and satisfaction.

[7] As pointed out above, the determination of what is "significant" enough to create the nexus and to render Iron Arrow subject to the regulation must turn on the facts and circumstances of the specific situation—what assistance might be significant to one organization might be insignificant to another. In this regard, in analyzing the relationship which has developed over the last fifty years between the University and Iron Arrow, one cannot help but believe that in this particular regard Iron Arrow is truly placed in a "Catch 22". The success and outstanding achievement developed over the last fifty years results in this Court finding that the degree of assistance necessary to create the nexus which would bring about subjecting the organization to the regulation in question is far less than it would be if the organization had been less successful and did not

enjoy the stature it has achieved. That is not to say that the assistance rendered by the University of Miami at the time this lawsuit was instituted was not in fact significant but quite the contrary.

In its letter informing the University of Miami of its noncompliance with Regulation 86.31(b)(7), H.E.W. cited a long list of tangible and intangible support, much of it of a very special or even unique nature in the relationship between Iron Arrow and the University. Although the relationship may have changed since H.E.W.'s May 25, 1976 letter, whether or not because of the demand for compliance, the relationship between Iron Arrow and the University had been and continued to be a very close one in the Spring of 1976.

The forms of assistance given by the University to Iron Arrow adduced during this lawsuit include: the use of real property located in front of the student union building in the center of the campus, called by Iron Arrow a "mound" and bearing a monument exalting Iron Arrow as "the highest honor in the University of Miami"; the existence of other plaques and statues throughout the campus recognizing Iron Arrow; the special recognition given to Iron Arrow at the University's homecoming football game; the use of the campus for Iron Arrow's tapping ceremony which takes place on the mound, a charter given to Iron Arrow by the University; the formal sponsorship of Iron Arrow by every president of the University throughout its history; the provision of secretarial services, mail boxes, mailing labels, and special meeting rooms to Iron Arrow, the existence of a faculty screening committee to propose new members to the society; and the special recognition

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of Iron Arrow in the University catalogue as the "highest recognition society for men."

Plaintiffs insist that they receive no direct financial support from the University of Miami. Nevertheless, Plaintiffs' complaint alleges that the loss of University supported homecoming activities involving Iron Arrow will, by itself, result in the loss of more than $10,000.00 to Iron Arrow. Defendant contends that the Plaintiffs' own complaint thus establishes significant assistance by showing how much Plaintiffs stand to lose by disassociation with the University of Miami. This Court does not accept that automatic standard for significance. Surely, significance must be judged by an objective standard, rather than the mere subjective importance the organization attaches to the assistance. However, $10,000.00 may well be objectively significant.

Furthermore, the Court wishes to disabuse the Plaintiffs of their mistaken impression that it is helpful to their cause that Iron Arrow may have "given much more than it received from the University of Miami." Such a mutually beneficial relationship tends rather to establish a closer nexus between the organization and the University. Here, Fourteenth Amendment state action doctrine provides a useful analogy. In *Norwood v. Harrison*, 413 U.S. 455, 93 S.Ct. 2804, 37 L.Ed.2d 723 (1973), the Supreme Court held that private schools were significantly aided by the State of Mississippi's program of providing textbooks to children in private schools which racially discriminated in their admissions policies. This aid was held to violate the equal protection clause of the Fourteenth Amendment, notwithstanding the obvious fact that the private schools saved the

state from making huge increase in expenditures for public education.

Based on the facts and circumstances surrounding this case, the Court cannot help but quote the phrase attributed by *Webster* to Franklin Delano Roosevelt, *supra*, "even though the individual (assistance) may seem small, the total of them is significant." In the face of Plaintiffs' admissions and the overwhelming and undisputed evidence of continuous, significant, and occasionally uniquely significant assistance provided to Iron Arrow by the University of Miami, the Court finds as a matter of law that H.E.W. correctly informed the University of Miami in 1976 that the University was not in compliance with H.E.W. Regulation 86.31(b)(7).

V.

H.E.W.'s enforcement procedure and its exercise of discretion to seek compliance in the present case.

[8] H.E.W. chose to enforce its regulation in this case by seeking voluntary compliance by the University of Miami rather than through a formal hearing process. While a hearing might have led to an earlier resolution of this case, H.E.W. was correctly following the clear statutory mandate in 20 U.S.C. §1682 to first attempt to induce voluntary compliance with its regulations, and then, only if that attempt fails, to begin hearings on the termination of funds. No party was denied a meaningful opportunity for review of the agency's action under the statutory procedure. This Court has given

the plaintiffs an opportunity to raise all objections it has to agency action and it is clear that the plaintiffs have not been deprived of life, liberty or property without due process of law.

[9] The plaintiffs have suggested that enforcement of Regulation 86.31(b)(7) as to Iron Arrow was arbitrary and discriminatory. The claim is unpersuasive. Iron Arrow is a highly appropriate subject of H.E.W. scrutiny given the purpose of Section 1681. Testimony at the hearing on Plaintiffs' demand for a temporary injunction by Judge Rhea Grossman, a witness for the Plaintiff, demonstrated the extraordinary value of Iron Arrow membership to career advancement. Judge Grossman stated that often a prospective employee's Iron Arrow membership is the only fact arousing the interest of a prospective employer.

The prestige and importance of Iron Arrow extends far beyond the campus of the University of Miami. Members of Iron Arrow have risen to prominent positions in the legal, political, business, and other professional communities in the Miami area. The present and previous mayors of the City of Miami and a former Dade County State Attorney, the University's athletic heroes, now prominent in professional sports, and many other successful and well known persons highlight the membership role of Iron Arrow. Thus, it is no wonder that Iron Arrow may be viewed as a very valuable benefit to students in terms of employment opportunity and career advancement, a benefit completely denied to women.

Iron Arrow may consider it ironic that its organization may have been singled out simply because it has been

prominent and successful. Nevertheless, the Court finds that the selection of Iron Arrow for investigation, based on an unsolicited complaint from the University community was not arbitrary, but was instead fully within the progressive spirit of §§1681 and 1682.

VI.

Declaratory relief.

This Court has evaluated H.E.W. Regulation 86.31(b)(7) and, as a matter of law, found it to be a proper exercise of statutory authority. The Court has also, as a matter of law, approved H.E.W.'s explanation of that regulation at 40 Federal Register 24132. The Court has found, as a matter of law, that H.E.W. correctly applied its regulation to the University of Miami in 1976. Finally, the Court has held, as a matter of law, that the enforcement procedure used by H.E.W. was proper and that the selection of Iron Arrow as a subject of investigation was not arbitrary or discriminatory

[10] The Court has not been presented with a sufficient factual basis to determine whether the University of Miami is now complying with Regulation 86.31(b)(7), nor is such an issue ripe for determination by this Court. However, the Court will state that should the University of Miami, at this time, decide to resume some contacts with Iron Arrow, H.E.W. could not consistently with §1682 begin a hearing to terminate the University's general federal funding until H.E.W. had first sought voluntary compliance. Further declaratory relief on the cross-motions for summary judgment is denied.

EXHIBIT 2

May 24, 1976

Dr. Henry King Stanford
President
University of Miami
Coral Gables, Florida 33124

Dear Dr. Stanford:

The Office for Civil Rights has concluded its investigation of a class complaint which alleges that the University of Miami is in violation of Title IX of the Education Amendments of 1972 because of the practice of the Iron Arrow Honor Society in excluding women from membership.

The complaint, which was originally filed on April 7, 1973, alleged that the Iron Arrow Honor Society at the University of Miami was both demeaning of American Indians in its utilization of Seminole Indian rituals and attire and discriminatory against women by its admitted policy of excluding them from membership.

The first charge noted above, was previously investigated by our office under Title VI of the Civil Rights Act of 1964 and a no cause finding was made. The University was advised of this finding on October 25, 1973. This letter addresses our findings on the second allegation of the complaint, based on an investigation conducted on-site in December of 1973

and pursuant to information and materials furnished us by the University.

As you know, Title IX prohibits discrimination on the basis of sex in education programs and activities receiving Federal financial assistance, except for certain exemptions not relevant to this case. The implementating Title IX regulation (a copy of which is enclosed) became effective July 21, 1975, and Section 86.31(b)(7) provides that:

> Except as provided in this subpart, in providing any aid, benefits, or service to a student, a recipient shall not, on the basis of sex:
>
> * * *
>
> (7) Aid or perputate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

The membership practices and policies of professional fraternal organizations, academic clubs, or honorary societies such as the Iron Arrow Honor Society are not directly covered by Title IX unless such organizations receive direct Federal financial assistance. However, if such practices and policies are discriminatory, they would place an institution subject to Title IX in violation of that provision where the institution aids the discriminatory organization as described in 86.31(b)(7). If the institution provides a faculty sponsor, meeting rooms, use of the institution's mail service, space in the

catalogue, or special recognition for the members, the institution is, in most cases, providing significant assistance so as to create the required nexus between Title IX and the organization. Certainly if the organization could not exist in its present form but for the assistance, it would be considered "significant." In order to be in compliance with Title IX, the institution must assure that the organization it assists conducts its activities in compliance with Title IX as a condition of providing the assistance.

It is undisputed that the University of Miami receives Federal financial assistance in the form of student aid and that the Iron Arrow Honor Society does not admit women to membership. Such facts indicate that the University of Miami is in noncompliance with Title IX if the University provides significant assistance to Iron Arrow. We conclude that it does provide such assistance based upon the factors discussed below.

The assistance to the Iron Arrow Honor Society is of two types. First, Iron Arrow benefits from recognition and identification with the University, thereby enhancing its prestige. Second, Iron Arrow benefits from tangible support such as secretarial service, alumni mailings, and the use of meeting rooms.

The following background information, revealed in the investigation, is evidence of the Iron Arrow's recognition by and identification with the University: The Iron Arrow Society was established in 1926 by Dr. Bowman Foster Ashe, the first President of the University of Miami. In 1950, President Ashe gave the Society a University Charter and "signed into law" a Constitution for the organization, affixing his signature and title as

President. According to the organization's head, Iron Arrow is the only campus group to receive a charter from the University.

The Society's constitution, as amended, allows for members to be either male students, faculty, administrative officials, staff or alumni of the University. It is stipulated that members "shall be selected on the prime basis of character and love for Alma Mater, with strong secondary criteria of leadership, scholarship, and humility as defined in the Ritual Book of the Tribe." The now operative amendments of the Society's constitution were "signed into law, A.D. 1971" by the current chief, or head, of the Society, and by you, the President of the University, with your title so designated.

A brochure prepared by the Society says that "Iron Arrow remains the University of Miami's first and most esteemed tradition." The purpose of Iron Arrow as stated in the University's directory of student organization is "to recognize junior and senior men, faculty, staff, and alumni for meritorious achievement and outstanding contributions to the University and its community." In the University's catalogue, reference is made to Iron Arrow as "the highest recognition society for men."

The prestigious position of Iron Arrow is further seen in the location of a monument which stands on a knoll outside the student union building. A plaque thereon says, in part: "Iron Arrow—founded in 1926 as the University's highest honor."

Among other visible signs of Iron Arrow's prestige is a plaque on the wall just inside the entrance to the

Ashe Building which houses administrative offices. The names of all members of Iron Arrow are included on additional mounts on the wall. In front of the plaque is a life-size statute of Dr. Ashe, the University's first President, and the founder of Iron Arrow.

Nearly all of the faculty and students interviewed by the investigators confirmed the fact that Iron Arrow is looked upon as the most prestigious organization on campus, and, as such, is particularly advantageous in employment opportunities.

In addition to the above described recognition received by Iron Arrow from the University, the investigation revealed evidence of tangible support of Iron Arrow from the University. For example, the alumni association does mailings and covers postage for Iron Arrow material, although the organization itself pays for printing costs. The Student Activities Office provides secretarial support. Furthermore, the University assists Iron Arrow by handling three separate accounts for them in the University's finance office. Iron Arrow has a room in the student union building with its name outside the door. Additionally, Iron Arrow utilizes a projection room in the athletic building where it also maintains certain objects or symbols pertaining to the organization.

In addition to a faculty member regularly serving as advisor to Iron Arrow, there is further substantial support for the Society by the University in the various procedures and ceremonies associated with the selection of members. There are "screening committees" in each school of the University, composed of student and faculty members. The "Tapping" ceremony occurs during classes

so that, when a faculty member is tapped for membership, he is led away by Iron Arrow members to join others in ceremonies at the monument outside the student union building.

Based on these above factors, we have determined that the University of Miami significantly assists the Iron Arrow Honor Society which discriminates against women by excluding them from membership. Accordingly, we are informing you that in order for the University of Miami to fulfill its obligation under Title IX, it must either require the Iron Arrow Honor Society to eliminate its policy of excluding women or discontinue its support of the Iron Arrow Society.

Within thirty days of the receipt of this letter, please submit to OCR information indicating actions you intend to take regarding this matter. You should plan to complete any such actions within ninety days of the receipt of this letter.

If you have any questions concerning this matter or if we may otherwise assist you, please contact John Morris of our staff who may be reached by telephone at (404) 526-2491.

Sincerely,

/s/ William H. Thomas
William H. Thomas, Director
Office for Civil Rights
(Region IV)

EXHIBIT 3

July 30, 1976

Dr. Henry King Stanford
Office of the President
University of Miami
Coral Gables, Florida 33124

Dear President Stanford:

This is to acknowledge our receipt of your letter of June 21, 1976, following your conference in our Office on June 17 on our findings in the case of the Iron Arrow Honor Society.

We will extend the time for the University to come into compliance with Title IX, insofar as Iron Arrow is concerned, until September 30. Naturally, we hope that the matter can be settled voluntarily.

We have reviewed Mr. John T. Benedict's memorandum regarding changes in the relationships between Iron Arrow Society and the University. The Memorandum does not alter our findings set forth in our May 24, 1976 letter. There continues to be a significant relationship between the Society and the University for coverage of the Society under Title IX of the Educational Amendments of 1972.

With reference to Mr. Benedict's claim that other University-supported organizations discriminate on the basis of race and sex, it is the University's responsibility:

(1) to insure that any such organizations which may exist and are not exempt from Title VI and IX coverage, respectively, expeditiously provide assurance to the University of their discontinuation of discriminatory policies; or (2) to discontinue its support of the non-exempt organizations.

If you should have any questions about our views on this matter, feel free to call me at Area Code (404) 526-3312. In the meantime, we will await word from you by or soon after September 30 as to the disposition of the matter.

Sincerely,

/s/ William H. Thomas
William H. Thomas, Director
Office for Civil Rights
Region IV

EXHIBIT 4

September 28, 1976

Mr. William H. Thomas, Director
Office for Civil Rights
Department of Health, Education,
and Welfare – Region IV
50 7th Street, N.E., Room 10
Atlanta, Georgia 30323

Dear Mr. Thomas:

This letter is a report to you on steps being taken by the University of Miami to bring the University in compliance with Title IX with respect to its relationship to the Iron Arrow Society.

You will recall that I asked for an extension of time through September in order that I might have an opportunity to talk with as large a number of members of the Iron Arrow Society as possible inasmuch as many of them, including alumni and faculty members, were on vacation during the summer. Now that the University has begun the fall semester, I have had an opportunity to meet with Iron Arrow representatives twice.

The first meeting occurred on September 9. There were approximately 30 members of the Society present. I discussed with them the letter which I had received from you. I explained to them that the HEW action is not directed against Iron Arrow, but against the

University of Miami. It was in this light, I said, that the Board of Trustees and I had to consider your letter. I told them that I thought Iron Arrow should admit women. While there was some heated denunciation of the HEW action, I was surprised that several members spoke out in favor of the admission of women. I then proposed that I invite to my home the entire membership for a general discussion, as I did not regard the relatively small number in attendance at the meeting as necessarily representative of the opinion of the entire membership.

On September 16 I had a second meeting with the officers of the Society and their attorney, Mr. John Chavez, a full-blooded Pueblo Indian, by the way. We discussed plans for the general membership meeting. I said that I would send the letter out over my signature extending the invitation to meet with me on the grounds of my home. A copy of the letter I propose to send is enclosed with this letter.

We are now trying to determine the date which would be most convenient for everyone in light of the heavy fall calendar. It will be impossible for me to get out a good representation of the membership before September 30. If your office would be willing to extend the date for final word from the University of Miami as to how the University will be brought into compliance with Title IX, it would give me better leeway in which to try to encourage voluntary acceptance by Iron Arrow of the principle of admission of women. This means that I would be able to inform you definitely by December 15, the end of the fall semester, as to whether Iron Arrow will accept women or the University will

discontinue its support of Iron Arrow. I do hope that your office will be willing to grant this extension.

Sincerely yours,

Henry King Stanford
President

[FILED MAY 24 1977]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 76-1850-Civ-JLK

IRON ARROW HONOR SOCIETY, et al,
Plaintiff,

vs.

FORREST MATTHEWS, et al,
Defendants.

ORDER OF DISMISSAL

This cause came on for consideration upon the parties' cross-motions for summary judgment and/or judgment on the pleadings. The court, having considered the record and being fully advised in the premises, finds and concludes that plaintiffs lack standing to sue and therefore the cause should be dismissed.

The District Court's jurisdiction to review agency action is limited to allegations that the complainant has been directly aggrieved or adversely affected, or caused to suffer legal injury. 5 U.S.C. §701 *et seq;* 28 U.S.C. §1331; *Califano v. Sanders,* _____ U.S. _____ (Feb. 23, 1977).

Plaintiffs' alleged injury concerns the refusal of the University of Miami to allow Iron Arrow's fall tapping ceremony to be held at the university's

homecoming festivities. Thus, plaintiffs' "injury in fact" was not caused by any act, regulation, or directive of defendant HEW; it was caused by the university's decision to comply with, rather than seek review of, that agency's regulations concerning sex-based discrimination in the membership policies of an educational institution's clubs. While the university arguably would have standing to contest the validity of HEW's regulations and directives a "person aggrieved," plaintiffs have no such standing. Although they may have suffered injury in fact, that injury is not directly attributable to agency action. Additionally, plaintiffs have no federal cause of action against the university. It is therefore

ORDERED and ADJUDGED that plaintiffs' complaint be and the same is hereby dismissed for lack of standing, without prejudice to the university's right to seek judicial review to agency action, should it so desire, and without prejudice to plaintiffs' right to bring any appropriate action against the university in state forum.

DONE and ORDERED in chambers at Miami, Florida, this 20th day of May, 1977.

/s/ James Lawrence King
JAMES LAWRENCE KING
UNITED STATES
DISTRICT JUDGE

cc: Elizabeth DuFresne
Mershon, Sawyer, Johnston, Dunwody and Cole

IRON ARROW HONOR SOCIETY, etc.,
Plaintiff-Appellant,

John T. Benedict, etc.,
Plaintiff,

v.

Joseph A. CALIFANO, Jr., Secretary of Health, Education and Welfare, et al.,
Defendants-Appellees.

No. 77—2375.

United States Court of Appeals,
Fifth Circuit.

June 11, 1979.

Honor society brought action against the Secretary of the Department of Health, Education and Welfare. The United States District Court for the Southern District of Florida, James Lawrence King, J., dismissed on ground that society was without standing to sue and the Society appealed. The Court of Appeals held that the district court's finding of lacking of standing for honor society to sue Department of Health, Education and Welfare was reversed in light of University's admission that but for HEW's actions, society would not have been excluded from campus activities.

Reversed.

Civil Rights —13.6

Colleges and Universities —10

Federal Civil Procedure —131,147

Court of Appeals reversed district court's finding of lack of standing for honor society to sue Department of Health, Education and Welfare in light of University's admission that but for HEW's actions, society would not have been excluded from campus activities.

Elizabeth J. duFresne, Miami, Fla., for plaintiff-appellant.

Jacob V. Eskenazi, U. S. Atty., Miami, Fla., Alexander C. Ross, Drew S. Days, III, Attys., U. S. Dept. of Justice, Washington, D. C., Charles C. Kline, Miami, Fla., Teresa T. Milton, Atty., Dept. of Justice, Washington, D. C., Byron B. Mathews, Jr., Miami, Fla., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Florida; James Lawrence King, Judge.

Before BROWN, Chief Judge, CLARK and VANCE, Circuit Judges.

PER CURIAM:

In light of the unequivocal statement of the position of the University of Miami that but for the action of the Secretary of Health, Education and Welfare it would

not have barred and would not in the future bar the Iron Arrow Honor Society from its campus, the decision of the district court on standing of the Society is reversed. *Gladstone Realtors v. Village of Bellwood, Part II*, ____ U.S. ____, ____, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979); *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 98 S.Ct. 2620, 2630, 57 L.Ed.2d 595 (1978).

REVERSED.

Opposition

Office - Supreme Court, U.S.
FILED
JAN 4 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-835

In the Supreme Court of the United States

OCTOBER TERM, 1981

IRON ARROW HONOR SOCIETY, PETITIONER

v.

T.H. BELL, SECRETARY OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

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Washington, D.C. 20530
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QUESTION PRESENTED

Whether the courts below correctly concluded that Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, authorized the Department of Health, Education, and Welfare to prohibit a university that receives federal financial assistance for its education programs and activities from providing "significant assistance," other than direct funding, to an honor society that discriminates on the basis of sex.

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T.H. BELL, SECRETARY OF EDUCATION, ET AL.[1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 652 F. 2d 445. The opinion of the district court (Pet. App. 11-38) is reported at 499 F. Supp. 496.

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[1]The court of appeals miscaptioned this case and petitioner has repeated this error. When petitioner filed its complaint, the Department of Health, Education, and Welfare (HEW) was responsible for enforcing Title IX of the Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 373, 20 U.S.C. 1681 *et seq.*, and the regulations promulgated under that title. That responsibility was transferred to the Department of Education (ED) by Section 301(a)(3) of the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 677, 678. ED then recodified HEW's regulations at 34 C.F.R. 106 *et seq.* without significant change. Petitioner challenges the enforcement of one of these regulations. Accordingly, Secretary Bell, rather than Secretary Schweiker, is the proper respondent.

JURISDICTION

The judgment of the court of appeals was entered on August 3, 1981. The petition for a writ of certiorari was filed on October 31, 1981. The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

STATEMENT

1. Petitioner Iron Arrow is an honor organization for men (Pet. App. 3). It was founded in 1926 by the University of Miami's first President for the purpose of honoring the University's most distinguished men (*id.* at 7-8). Because of its long association with the University, Iron Arrow has been regarded as the most prestigious organization on campus and its members have enjoyed a particular advantage in securing jobs (*id.* at 37, 43).

In the past decade, there has been increasing opposition to Iron Arrow's male-only membership policy (Pet. App. 16). However, "the organization has steadfastly refused to admit women" (*id.* at 16-17).

In 1973, the Department of Health, Education, and Welfare (HEW) received a complaint concerning Iron Arrow's exclusive membership policy (Pet. App. 18). Upon finding that the University of Miami received federal financial assistance in the form of student aid, HEW launched an investigation to determine whether the University had engaged in discrimination in violation of Title IX of the Education Amendments of 1972 (*id.* at 19). That statute provides, with certain exceptions, that "[n]o person * * * shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * *." 20 U.S.C. 1681(a).

Because HEW had not yet formulated regulations to enforce Title IX, it decided to suspend its investigation of the University until it had completed that process (Pet.

App. 19-20). The regulations finally became effective in 1975. One of the regulations directly addressed the obligation of a university to avoid assisting honor societies and other campus organizations that discriminate on the basis of sex. It provided that "a recipient shall not * * * [a]id or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex." 45 C.F.R. 86.31(b)(7) (1975), now codified at 34 C.F.R. 106.31(b)(7).

In 1976, HEW completed its investigation and informed the University of its conclusion that the University had violated Section 86.31(b)(7) by providing "significant assistance" to Iron Arrow (Pet. App. 20). HEW explained that the prohibited assistance took two forms (*id.* at 41):

> First, Iron Arrow benefits from recognition and identification with the University, thereby enhancing its prestige. Second, Iron Arrow benefits from tangible support such as secretarial service, alumni mailings and the use of meeting rooms.

HEW instructed the University that in order to fulfill its obligation under Title IX, it "must either require the Iron Arrow Society to eliminate its policy of excluding women or discontinue its support of the Iron Arrow Society" (*id.* at 44).

The University immediately informed HEW that it intended to comply with Title IX (Pet. App. 21; PX2). However, it asked HEW to consider a memorandum prepared by Iron Arrow which questioned whether the University was actually providing significant assistance to Iron Arrow (*ibid.*). After HEW responded that the memorandum did not affect its original conclusion, the University told Iron Arrow that it could no longer perform its functions on campus (Pet. App. 21-22).

2. Iron Arrow then filed suit against the University and the Secretary of HEW (Pet. App. 17, 22). It sought to enjoin the Secretary from interpreting HEW regulations in a way that would deter the University from permitting Iron Arrow to conduct its activities on campus (*id.* at 17). On cross-motions for summary judgment, the district court denied Iron Arrow's request for relief (Pet. App. 11-38).

The court held that HEW could prohibit a university receiving "general grants of federal support" (Pet. App. 28 n.1) from providing significant assistance to an honor society that discriminates on the basis of sex, even though the honor society does not itself receive federal funding (*id.* at 26-30). The court explained that such a regulation is "useful and necessary to the effectuation of [Title IX]" (*id.* at 29).

The court also sustained HEW's conclusion that the University of Miami had provided "significant assistance" to Iron Arrow within the meaning of the regulation. The court relied upon "a long list of tangible and intangible support" including (1) the use of campus property outside the student union for Iron Arrow activities; (2) a monument on that property describing Iron Arrow as the University's highest honor; (3) other plaques and monuments throughout the campus recognizing Iron Arrow; (4) special recognition of Iron Arrow at Homecoming; (5) a University charter; (6) formal sponsorship of Iron Arrow by every University president; (7) the provision of secretarial services, mail boxes, mailing labels and special meeting rooms; (8) a faculty screening committee to propose new members; and (9) recognition in the University catalogue as the University's highest honor for men (*id.* at 34-35).

3. The court of appeals affirmed. The court concluded that HEW's regulation clearly effectuates the provisions of Title IX and is consistent with the achievement of the objectives of that statute (Pet. App. 6).

The court of appeals also held that HEW had properly concluded that the University had provided "significant assistance" to Iron Arrow (Pet. App. 9-10). The court acknowledged that certain physical assistance extended by the University (*e.g.*, mailing services and secretarial support) had been terminated (*ibid.*); but it emphasized that the University had "created the honorary society as an activity of great importance in the building of student morale and leadership" and that without its continued support "Iron Arrow could not exist" (*id.* at 10). Iron Arrow's argument that the University had not provided it with significant assistance, the court concluded "simply falls of its own weight" (*ibid.*).

ARGUMENT

The decision of the court of appeals is narrow; it conflicts with no decision of this Court or of any other court of appeals; and it represents a reasonable construction of the statute as applied to the unique facts of this case. Further review is, accordingly, unwarranted.

1. Section 901(a) of the Education Amendments of 1972, 20 U.S.C. 1681(a), prohibits discrimination on the basis of sex in "any education program or activity receiving Federal financial assistance." The district court assumed (Pet. App. 28 n.1) that the University was the recipient of "general grants of federal support" and petitioner makes no issue of the breadth of that federal financial support except to assert that petitioner itself receives no direct funding from either the federal government or the University (Pet. 13-14, 30).[2]

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[2]The district court noted that it was required to assure itself that a federally assisted education program or programs were involved because of the Fifth Circuit's holding in *Dougherty County School System* v. *Harris*, 622 F. 2d 735 (1980), petition for cert. pending, No. 80-1023 (filed Dec. 22, 1980), that Title IX does not prohibit discrimination in education programs or activities that do not receive federal financial assistance.

Because petitioner also appears not to challenge the view that regulations under Title IX may, in some instances, properly reach "significant assistance from a federal [aid] recipient" to a university organization (Pet. 30), the case is essentially limited to the question whether 34 C.F.R. 106.31(b)(7) properly prohibits a university comprising federally assisted education programs and activities from throwing its weight behind the discriminatory practices of a university-chartered organization by providing "significant assistance," other than direct funding or material support, to that organization.

2. The courts below did not err in concluding that a regulation imposing such a prohibition is within the express grant of regulation-promulgating authority in 20 U.S.C. 1682, that it is reasonably related to the purposes of Title IX, and that it is therefore valid under settled legal principles. *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 369 (1973); *Thorpe* v. *Housing Authority of Durham*, 393 U.S. 268, 280-281 (1969).

The premise of HEW's "significant assistance" regulation is that there may be instances in which even non-financial assistance given to an organization by a university may be so significant that the activities of the organization are fairly imputable to the university itself. The regulation has served to prevent schools from attempting to circumvent the statutory ban on the direct operation of educational activities such as honor societies that strongly affect future employment opportunities and that discriminate on the basis of sex.[3] Had HEW merely prohibited a university from directly employing its federal assistance to operate its own

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[3]This Court has previously upheld efforts by agencies to counteract attempts to evade the purposes of a statute. *Mourning* v. *Family Publications Service, Inc., supra*, 411 U.S. at 370-371; *Gemsco, Inc.* v. *Walling*, 324 U.S. 244 (1945).

exclusive honor societies, the university would have been free to charter an independent honor society, involve the university's faculty in the society's activities, and promote membership as one of the university's highest honors. The university would thereby be enabled to accomplish indirectly, what it could not do directly—extend the benefits of its federal funding to an organization that offers valuable career assistance to the members of one sex.[4]

These are the circumstances that both courts below found in this case. They found that the identities of petitioner and the University were so closely intertwined by tradition, practice, and reputation—in such forms as memorial plaques and mounds, statements in the University catalogue according special recognition to petitioner, and student-faculty "screening committees" to select petitioner's members—that petitioner virtually had no existence separate from the University (Pet. App. 7-10, 32-36, 37). A finding based on such special facts does not, as petitioner suggests (Pet. 13), "threaten[] the existence of all single-gender collegiate honor societies."

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[4]The fact that membership in Iron Arrow could significantly affect a student's employment prospects was critical to this case; for in amending Title IX in 1974, Congress clearly expressed an intent that the statute reach organizations serving such functions, as opposed to predominantly social organizations. Thus the 1974 amendment provided an exemption for the membership practices of social fraternities and sororities from the proscriptions of Section 901 (see 20 U.S.C. 1681(a)(6)), but when Senator Bayh introduced the amendment, he emphasized (120 Cong. Rec. 39992 (1974)):

> [T]his exemption covers only Greek organizations; it does not apply to professional fraternities or societies whose admissions practices have a discriminatory effect upon the future career opportunities of a woman.

As the district court noted (Pet. App. 28; footnote omitted), the 1974 amendment is not inconsistent with "a Congressional intent to reach sexually discriminatory honor societies in close association" with federally assisted education programs and activities.

3. There is no merit to petitioner's suggestion (Pet. 26) that the decisions of the courts below conflict with decisions of other courts of appeals under Title IX. The decisions petitioner cites from the First, Eighth, and Ninth Circuits (Pet. 26) concern the scope of employment coverage in Section 901. With respect to the separate question of the limitation of coverage to any federally assisted "education program or activity," those decisions are consistent with the former Fifth Circuit's decision in *Dougherty County School System* v. *Harris*, 622 F. 2d 735 (1980), petition for cert. pending, No. 80-1023 (filed Dec. 22, 1980)—a case the district court expressly noted (Pet. App. 28 n.1) as controlling. We believe that, on the record here, the decisions of the courts below are entirely consistent with *Dougherty County* and with *Board of Public Instruction of Taylor County* v. *Finch*, 414 F. 2d 1068 (5th Cir. 1969).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

WM. BRADFORD REYNOLDS
Assistant Attorney General

WALTER W. BARNETT
IRVING GORNSTEIN
Attorneys

JANUARY 1982

DOJ-1982-01